IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1414 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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NARESH ALIAS LALO BABUBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1414 of 2001
MS SUBHADRA G PATEL for Petitioner No. 1
MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 18/07/2001

ORAL JUDGEMENT

#. Heard Ms.S.G.Patel, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP for the respondents.

#. In the present petition, the petitioner has

challenged the order of detention dated 27th December, 2000 under Article 226 of the Constitution of India. The order of detention has been passed by the Police Commissioner, Ahmedabad City under Section 3[1] of the PASA Act. The grounds of detention are communicated and supplied to the petitioner under Section 9[1] of the PASA Act. The petitioner has been detained in Jamnagar Jail as Class II detenu. The petitioner has been considered as the bootlegger under Section 2[b] of the PASA Act. That one offence has been registered against the present petitioner at Meghaninagar Police Station vide C.R. No.5307 / 2000 dated 24th December, 2000. The statements of the secret witnesses are recorded on 24th December, 2000 and 25th December, 2000 and the same are verified by the detaining authority on 26th December, 2000. According to the grounds of detention, at the time of passing the detention order, the petitioner was under police remand, in other words, the detenu was in the police custody. There are other three co-detenu in respect of the very same offence, against whom also, the order of detention are passed by the detaining authority on the very same day. The details of the other co-detenus are as under :-

[1] The petitioner of Special Civil Application No.1413 / 2001 - Ramjan Liyakatbhai Pathan, who has been detained at Jamnagar District Jail.

[2] The petitioner of Special Civil Application No.1415/ 2001 - Babu Rameshbhai Madrashi who has been detained in Vadodara Central Jail.

[3] The petitioner of Special Civil Application No.1824 / 2001 - Sarafat Liyakatbhai Pathan who has been detained at Bhavnagar District Jail.

It is also observed that all three petitioners of the respective petition are the co-accused with the present petitioner in the offence vide C.R. No.5307 / 2000 registered at Meghaninagar Police Station dated 24-12-2000 and they all are the co-detenu along with the present petitioner. Therefore, against all four orders of detention, the learned advocate for the petitioner Ms.S.G.Patel has raised common contentions in respect of only one offence registered against each co-detenu including the present petitioner. In all four matters, the detaining authority has claimed privilege under Section 9[2] of the PASA Act. The respondents detaining authority has filed a detailed affidavit in reply in all four matters.

#. Learned advocate Ms.S.G.Patel has challenged the detention order on various grounds but according to her submission, two contentions are enough to vitiate the order of detention. The first contention raised by the learned advocate Ms.S.G.Patel is that at the time of passing the detention order, it is undisputed that the petitioner was on remand with police custody. Therefore, she submitted that after completion of the remand period, it is not necessary that the petitioner would have been released by the police authority but he was required to be produced before the concerned Magistrate and the concerned Magistrate might have granted or might not have granted the bail in favour of the petitioner - detenu. In the event of non granting of the bail, the petitioner would have been sent to the judicial custody. Therefore, she submitted that when there is no cogent material with the detaining authority as to immediate release of the petitioner, then there is no purpose to pass the detention order against the petitioner or it can not be said that there were any compelling circumstances to pass the detention order against the present petitioner. She submitted that looking to one offence registered against the present petitioner dated 24th December, 2000, very hasty step has been taken by the concerned authority to the effect that on the same day, when the alleged offence has been committed by the petitioner, statement of secret witnesses were recorded on 24th December, 2000 and 25th December, 20000 and on the very next date, these statements were verified by the detaining authority. Thereafter, immediately in a mechanical manner, the detaining authority has verified the said statements and not only that after verification of the statements of the secret witnesses on the next date, the order of detention has been passed without examining the genuineness of the statements which have been recorded from the secret witnesses. Therefore, she submitted that within a period of four days only, the order of detention has been passed by the detaining authority from the date of offence dated 24th December, 2000. Therefore, according to her submission, the detaining authority has acted in very hasty, mechanical and arbitrary manner and therefore, the order of detention has been passed without application of mind and hence, the same deserves to be quashed and set aside by this Court.

#. Learned advocate Ms.S.G.Patel has raised two contentions while challenging the impugned order of detention. She has submitted that at the time of passing the impugned order of detention, the petitioner was in

judicial custody and after verifying the statements of the secret witnesses, on the next day, the impugned order has been passed and, therefore, it amounts to non application of mind on the part of the detaining authority. She has submitted that the detaining authority has passed the impugned order of detention in mechanical manner. She has relied upon the following decisions:

1. Ranubhai Bhikhabhai Bharwad (Vekaria) versus State of Gujarat reported in 2000(3) GLR page 2696.
2. Ramesh Yadav versus District Magistrate and another (supra) reported in 1985 (4) SCC 232

3. Amrutlal and others versus Union of India reported in 2000(1) SCC 341.

4. Rivadeneyta Ricardo Augustin versus Government of the National Capital Territory of Delhi and others reported in 1994 SCC (Cri) 354.

#. Learned AGP Mr. Jani has supported the impugned order of detention and has submitted that there is no bar in passing the order of detention of a person while in judicial custody. Therefore, according to Mr. Jani, the impugned order of detention has rightly been passed by the detaining authority and, therefore, this Court should not interfere with the same and therefore, this petition is required to be dismissed.

#. I have considered the arguments of the learned advocates for the respective parties. I have considered the contentions raised by the learned advocate Ms. S.G.Patel, that at the time of passing of the order of detention, the petitioner was in judicial custody. I have also considered the next contention raised by Ms.S.G.Patel about non application of mind on the part of the detaining authority in passing the impugned order of detention.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would

again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

#. In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offences registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail and to indulge in the same activities again after release on bail.

In case of Rivadeneyta RIcardo Augustin (supra), the apex court has held as under in para 4 :

"4. Though several grounds are urged in support of the writ petition by Shri Ram Jethmalani, learned counsel for the petitioner, it is not necessary to refer to all of them except one of which, in our opinion, merits acceptance. It is submitted that on the date the order of detention was made the petitioner was in judicial custody. The bail petitions filed by him were dismissed finally on June 9, 1992. He did not move any bail application thereafter. No bail application was pending on August 18, 1992. There was no other circumstance indicating that the petitioner would be released from custody. In these circumstances, there was no material before the authority to believe that there was a real possibility of the petitioner being enlarged on bail or being released and that it is necessary to detain him to prevent him from engaging in prejudicial activity. It is pointed out that according to the counter, proposal for

the detention was sent to the Administrator on May 22, 1992 but the authority passed the order only on August 18, 1992 without apprising himself of the fact situation prevailing in the middle of August 1992. Reliance is placed upon two decisions of this court in Kamarunnisa v. Union of India and Hawabibi Sayed Hanif v. L. Hmingliana. In the first case the principle relied upon by the learned counsel, is stated in the following words : (SCC pp.138-39)

'The decisions of this court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. We will now consider the case-law in brief.

In vijay Narain Singh this court stated that the law of preventive detention being a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution would suffice. So also in Ramesh Yadav v. District Magistrate, Itah, this court stated that ordinarily a detention order should not be passed merely on the ground that the detenu who was carrying on smuggling activities was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and if granted, challenge the order in the higher forum but not circumvent it by passing an order of detention merely to supersede the bail order. In Suraj Pal Sahu v. State of Maharashtra, the same principle was reiterated. in Binod Singh v. District Magistrate, Dhanbad, it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material

> before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from material on record and must not be the ipse dixit of the officer passing the detention order. Eternal vigilance on the part of the authority charged with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental freedom of the citizens. This Court, therefore, emphasized that before passing a detention order in respect of the person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained. "

In case of Amratlal and others versus Union of India (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner under the Bombay Prohibition Act.

#. There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority,

subjective satisfaction is not established, looking to the facts of the present case.

#. However, learned AGP Ms. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Ms. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

##. I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made

on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power U/s. 9(2) and it is established that in such case the wrong exercise of power U/s. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be

> defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege U/s. 9(2) of the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

##. Looking to the observations made hereinabove, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention passed by the Police Commissioner, Ahmedabad City dated 27.12.2000 is vitiated and resulted to quash and set aside. The detenu - NARESH ALIAS LALO BABUBHAI who has been detained at Nadiad Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

Dt.18.7.2001 [H.K. Rathod, J.]

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